IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.655 OF 1999

DIST. SOLAPUR

Dnyneshwar Shrimant Nagane, age 21,)
R/o. Thobade Vasti, Degoan Road,)
Solapur. At present in Yeroda Central)
Prison, Yeroda.) ... Appellant/Accused

Versus

The State of Maharashtra.) ... Respondent

Mr. S.S. Salunkhe for the appellant- accused.

Mr. D.R. More, A.P.P. for the respondent- State.

CORAM : SMT. RANJANA DESAI & D.G. KARNIK, JJ.

DATED : 13TH MARCH, 2006.

ORAL JUDGMENT : (Per D.G. Karnik, J.)

1. The appellant has been convicted under section 302 of I.P.C. for murder of Mrs. Veena Bharat Shah and sentenced to suffer

imprisonment for life and to pay fine of Rs.3,000/- and in default to suffer further imprisonment for one year. He has been further convicted under section 324 of I.P.C. for causing hurt by knife to Bharatbhai Shah and sentenced to suffer one year's rigorous imprisonment. He has also been convicted for offence under section 452 of the Code and sentenced to suffer two years' rigorous imprisonment and to pay fine of Rs.1,000/- and in default to suffer six months' further rigorous imprisonment.

2. The prosecution story is as under :

Deceased Veena was residing in a flat situated on the ground floor of the building known as “Satyam Shivam Sundaram Apartments” in Sholapur. The said building consists of three wings and deceased Veena was staying in the wing known as “Shivam Apartment”. The “Shivam Apartment” consists of three floors and on each floor, there is only one flat. PW-1 Ashita was residing on the second floor of “Shivam Apartment”. On 25/8/1998 at about 2.00 p.m., one person rang the door bell of the flat of PW-1 Ashita. After opening the door, PW-1 Ashita found one person (whom she later identified as the accused) standing outside the door. He inquired of her whether Mahesh Kulkarni resided there. PW-1 Ashita informed him that Mahesh Kulkarni did not stay there and started to close the

door. The accused then demanded water and started pushing the door. At that time, the father-in-law of PW-1 Ashita asked from inside who was there? Hearing the male voice, the accused ran away. At about 5.00 p.m., PW-1 Ashita, therefore, called the watchman of the building and told him not to allow any stranger to come in and do his duty properly. On 27/8/1998, there was a religious ceremony called as "Kshama-Yachana" in the house of Bharatbhai Shah and, hence, PW-1 Ashita went to the house of Bharatbhai Shah. There, PW-1 Ashita narrated the incident of 25/8/1998 to Veena, the wife of Bharatbhai Shah and told her that they should be cautious. On 28/8/1998 between 1.30 p.m. and 2.00 p.m., when Veena and Bharatbhai came back home from outside, Bharatbhai saw the accused standing near his flat and inquired why he was standing there. The accused then inquired whether Mahesh Kulkarni stayed there. Bharatbhai and deceased Veena remembered the conversation which PW-1 Ashita had with them on the previous day and got suspicious. They, therefore, called PW-1 Ashita, who came down from her flat. Bharatbhai inquired from PW-1 Ashita as to whether the accused was the same person who had come to her house on 25/8/1998. PW-1 Ashita identified the accused to be the same person. Bharatbhai, therefore, went inside his flat to telephone the police. The accused tried to run away but, the watchman who was standing nearby prevented him from fleeing. Within minutes,

Bharatbhai came out and gave couple of slaps to the accused and closed the main collapsible gate of the building. In the meanwhile, deceased Veena went inside the flat. As Bharatbhai closed the main collapsible gate, the accused followed deceased Veena inside the flat and attacked her with a knife. As PW-1 Ashita and Bharatbhai heard the cries of Veena they rushed inside when they found the accused assaulting Veena with a knife. Bharatbhai intervened and tried to save Veena when the accused stabbed even Bharatbhai on the abdomen and knee. PW-1 Ashita also received abrasion of knife on her hand. All of them then managed to push the accused in one room and closed the door and chained it from outside. The police were called and they arrested the accused. Veena and Bharatbhai were taken to the Chidgupkar hospital by rickshaw by PW-1 Ashita and the neighbours, who had by then gathered there. Deceased Veena succumbed to her injuries and died between 4.00 p.m. and 5.00 p.m. on the same day. Bharatbhai, however, survived. Police came to the hospital immediately and recorded statement of PW-1 Ashita which was treated as the First Information Report. The police then went to the flat and seized the knife used by the accused. The accused was tried for the offence of murder, hurt, etc. and was convicted and sentenced as aforesaid.

3. Before the Sessions Court, seven witnesses were examined.

Ashita was examined as PW-1 and Bharatbhai Shah was examined as PW-2. Dr. Nilkanth Belavi, who performed the post-mortem was examined as PW-3. The watchman Sidram Kunnurkar was examined as PW-4. PSI Vishnu Jagtap was examined as PW-5 and Investigating Officer Abhimanu Lokhande was examined as PW-6. One Dr. Manik Gaikwad was also examined as PW-7 regarding the injury to the left little finger of the accused.

4. There were three eye-witnesses to the crime and they are PW-1 Ashita, PW-2 Bharatbhai and PW-4 Sidram, the watchman. All of them have narrated the incident. The accused was caught on the spot and was handed over to the police. The presence of the accused at the scene of the crime was not disputed before us. Though it was contended that the accused had not assaulted and killed Veena, the statement of the three eye-witnesses leave no doubt that it is the accused who attacked and killed Veena. The three eye-witnesses have seen the accused committing the crime. PW-2 Bharatbhai is the husband of deceased Veena and had no enmity whatsoever with the accused. All the three eye-witnesses are most natural witnesses and their presence in the scene of offence is also natural. We have, therefore, no doubt in our mind that it is the accused, who attacked deceased Veena with the knife and caused her death. Considering weight of the evidence adduced on record, learned counsel for the

accused did not even seriously argue about the accused not being involved in the crime.

5. The learned counsel for the accused however submitted that on the facts of the case, the accused was entitled to the benefit of section 96 of the Code. The accused had caused the death of deceased Veena in exercise of his right of private defence. He submitted that PW-2 Bharatbhai had given a few slaps to the accused. By closing the main collapsible gate of the building PW-2 Bharatbhai, PW-1 Ashita and PW-4 Sidram, the watchman were trying to cause illegal confinement of the accused. In view of the slapping, the accused had reasonable apprehension in his mind that PW-2 Bharatbhai and the watchman would cause such bodily injury to the accused as was likely to cause his death or at least grievous hurt. The accused was, therefore, entitled to the right of private defence and was entitled to do all things to prevent his death or grievous hurt. The learned counsel further submitted that in any event, there was a reasonable apprehension in his mind that he would be assaulted and, therefore, at the most, it can be held that the accused had exceeded his right of private defence. In support of his submissions, the learned counsel relied upon three decisions of the Supreme Court in *Kashiram and others v. State of M.P., reported in (2002) 1 SCC 71; Mohinder Pal Jolly v. State of Punjab reported in (1979) 3 SCC 30 and Sekar alias*

Raja Sekharan v. State represented by Inspector of Police, T.N., reported in (2002) 8 SCC 354.

6. In *Kashiram's case (supra)*, the Supreme Court has held that the plea of private defence can be taken up by introducing such plea in the cross-examination of prosecution witnesses or in the statement of the accused persons recorded under section 313 of the Criminal Procedure Code or by adducing defence evidence. Even if the plea is not introduced in any of these three modes, it can still be raised during the course of submissions by relying on the probabilities and circumstances obtaining in the case. The Supreme Court relied upon its earlier decision in *Vijayee Sing's case reported in AIR 1990 SC 1459*.

7. In *Mohinder Pal Jolly's case (supra)*, it was held that though the onus to establish this right/plea of private defence, was on the accused. He was not required to prove this on the standard of proof beyond doubt but merely on the basis of preponderance of probability. He might or might not take this plea explicitly and may or may not adduce any evidence in support of it but he can succeed in his plea if he is able to bring out materials in the records of the case on the basis of the evidence of the prosecution witnesses or on other pieces of evidence to show that the apparently criminal act

which he committed was justified in exercise of his right of private defence of property or person or both.

8. The decision in *Sekar alias Raja Sekharan's case (supra)* was relied upon for the purpose of quantum of sentence and it was contended that considering the facts of the present case, the appropriate punishment would be imprisonment upto 10 years instead of life imprisonment.

9. Perusal of the judgments of the Supreme Court in *Kashiram's case (supra)* and *Mohinder Pal's case (supra)*, leaves no manner of doubt that the burden of proving that the accused committed the act in exercise of his right of private defence is on the accused. This burden can be discharged firstly by adducing defence evidence or secondly by statement of the accused recorded under section 313 of the Cr.P.C. or thirdly even by appropriate cross-examination of prosecution witnesses. The accused is also entitled to show that considering the entire evidence and considering the probabilities of the case, the act complained of was done by the accused in exercise of his right of private defence. While the prosecution is required to prove its case beyond reasonable doubt, the accused is not required to prove the plea of his self defence on the rigorous standard of proof beyond reasonable doubt. It would be enough if he proves his plea of

self defence by preponderance of probabilities. In other words, while the standard of proof for the prosecution to prove a fact is proof beyond reasonable doubt, the standard of proof for a plea of self defence is by preponderance of probabilities. As stated earlier, such preponderance of probabilities can be established by a positive defence evidence or a statement recorded under section 313 of the Cr.P.C. or even by cross-examination of the prosecution witnesses.

10. In the present case, it would therefore be necessary to see whether the accused has discharged his burden howsoever light it may be by proving that he caused the death of Veena in exercise of his right of private defence.

11. The learned counsel for the appellant/accused invited our attention to the statement of PW-1 Ashita wherein she has stated that as the accused was attempting to flee, PW-2 Bharatbhai gave 2/4 slaps to him and closed the main collapsible gate. The learned counsel submitted that the fact that PW-2 Bharatbhai gave 2/4 slaps to the accused was proved by the deposition of PW-1 Ashita. It was further proved that PW-2 Bharatbhai was trying to close the gate. The accused, therefore, had reasonable apprehension in his mind not only that he would be prevented from fleeing but that after being caught he will be thrashed, because he had already been given

several slaps by PW-2 Bharatbhai. There were two male persons viz. PW-2 Bharatbhai and PW-4 Sidram, the watchman present, who could have overpowered and thrashed the accused.

12. Section 100 of the I.P.C. extends the right of private defence of the body so as to cause death or any other harm to the assailant if the occasion which connects the exercise of the right of private defence is any one of the following: (1) such an assault as may be reasonably cause the apprehension that death will otherwise be the consequence of such assault; (2) such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault; (3) an assault with the intention of committing rape; (4) an assault with the intention of gratifying unnatural lust; (5) an assault with the intention of kidnapping or abducting and (6) an assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release. Admittedly, the occasion on which the accused is said to have used his right of private defence does not fall under item Nos.3, 4 and 5. There is not even a suggestion that the two slaps and the possible assault on the accused would have been such as would give a reasonable apprehension in his mind that death or a grievous hurt would be the consequences of

such assault. PW-2 Bharatbhai and Veena had come from outside and were unarmed. There is no evidence of PW-4 Sidram, the watchman was wielding any arm. It was a broad day light. The accused was accosted just outside the door of the flat of the deceased Veena. The accused is a male, able bodied person, aged about 21 years. Therefore, the first and second possibilities are also ruled out. Though PW-2 Bharatbhai wanted to close the main collapsible gate, it was not with the intention of wrongfully confining the accused as earlier PW-2 Bharatbhai had gone inside the flat telling that he would make a telephone call to the police. The police were called by PW-2 Bharatbhai. The closing of the collapsible gate was with an intention to prevent the accused from fleeing away. There is, therefore, no doubt in our mind that if at all the accused was exercising his right of a private defence, he has clearly exceeded it.

13. While PW-2 Bharatbhai and PW-4 Sidram were trying to prevent the accused from fleeing away, Veena had already gone inside the house. If the accused wanted to flee, his attempt would be to go towards the gate, open it and flee away. There was no reason for the accused to follow Veena inside her house. When accused followed Veena inside the flat, he certainly was not exercising his right of private defence. The accused appears to have then taken the knife from the kitchen and attacked Veena. It is true that in the cross-

examination, it has come on record that the knife used by the accused was of a type which ordinarily found in the kitchen. It is also true that there is no evidence that the accused was carrying the knife with himself and, therefore, the accused must have taken the kitchen knife and used it to assault Veena. However, that would only rule out the prior intention to commit the murder. That would not in any way further the case of the accused that he was exercising his right of private defence. We have perused the post-mortem notes which have been proved by PW-3 Dr. Nilkanth. The post-mortem notes show as many as six injuries out of which five are stab wounds on the body of deceased Veena. The first stab injury is over the right hypochondriacs 7" below right nipple admeasuring 1" x ½". The second stab injury is over per umbilical region 1½" from umbilical of the size of ½" x ½". The third stab injury is over the chest 2½" below supraskunal notch and 1" x ½" in size. Thus at least three stab injuries were given on the vital parts of chest and stomach. Even if the accused may not initially had an intention to cause death of Veena, the very nature of the injuries and multiple number of stabs on the chest and stomach would show that the accused would have certainly known that the injuries would cause death or the injuries were sufficient in the ordinary course of nature to cause death. The case would, therefore, fall under the clauses "secondly" or "thirdly" of section 300 of the I.P.C. We are, therefore, satisfied that the accused

is guilty of an offence of murder as defined under section 300 and punishable under section 302 of the I.P.C.

14. The learned counsel for the accused invited our attention to the statement of PW-7 Dr. Gaikwad in which he has stated that there was simple injury on the right little finger of the accused. The learned counsel submitted that there was evidence on record to show that the accused was injured and, therefore, the accused could have had reasonable apprehension in his mind that death or at least grievous hurt would be caused to the accused by PW-2 Bharatbhai and PW-4 Sidram, the watchman. In the statement recorded under section 313 of the Cr.P.C., the accused has nowhere stated that he ever apprehended death or grievous hurt at the hands of PW-2 Bharatbhai or PW-4 Sidram, the watchman and has also not stated that he apprehended death or a grievous hurt or any other bodily injury by anyone. In fact, in answer to question No.109 by which the accused was asked about what he wanted to say about the scratches seen on his little finger, he stated that it was false. A more specific question was put to the accused that PW-7 Dr. Gaikwad had stated in his evidence that there was simple injury on the right little finger and what the accused wanted to say about it. The accused categorically stated that the report was false and further added that there was no injury on his person. Thus, it was the case of the

accused that Dr. Gaikwad's evidence was not true and that there was no injury on his right little finger; the accused further stated that there was no injury on any part of his body. If so, the statement of PW-7 Dr. Gaikwad would in no way help the accused to contend that there was any bodily injury on him and that he apprehended death or grievous hurt.

15. Here we may refer to the decision of the Supreme Court in *Kuriakose & Anr. v. State of Kerala, 1994 Suppl (1) SCC 602.* In that case, while dealing with the defence of an accused of his right of private defence, the High Court has observed that in the statement under section 313 of the Cr.P.C., no plea of right to private defence had been taken by any of the accused. The High Court had further held that there was no mischief committed by either of the deceased for which there was any occasion to exercise right of private defence. The Supreme Court confirmed the decision of the High Court by holding : "In our view, the High Court is wholly justified in holding that the case of right to self-defence cannot be accepted. The accused did not plead any right to self-defence. On the contrary, they simply stated that they were assaulted and out of fear for life they escaped from the place of occurrence.".

16. We may also note that Veena, a woman who was unarmed and

had gone inside the flat was chased by the accused and brutally attacked with a knife. There was no threat by her to the accused. She was assaulted even before PW-2 Bharatbhai and PW-4 Sidram, the watchman could come in. The accused had no right whatsoever of private defence against Veena when he assaulted her with the knife. His plea of private defence against Veena has to be rejected in toto.

17. For these reasons, the appeal is dismissed. The conviction of the accused - Dnyneshwar Shrimant Nagane for the offence under section 302 of the I.P.C. as also the sentence awarded to him to suffer imprisonment for life and the fine of Rs.3000/- and in default to suffer further one year's rigorous imprisonment, are maintained. The further conviction of the accused - Dnyneshwar Shrimant Nagane under section 324 of the I.P.C. for causing hurt by knife to Bharatbhai Shah and the sentence awarded to him to suffer one year's rigorous imprisonment are also maintained. Further, the conviction of accused - Dnyneshwar Shrimant Nagane for offence under section 452 of the I.P.C. and the sentence awarded to him to suffer two years' rigorous imprisonment and to pay fine of Rs.1,000/- and in default to suffer six months' further rigorous imprisonment, are also maintained. The appellant shall be entitled to the set off under section 428 of the Cr.P.C. as allowed by the Sessions Judge.

(SMT. RANJANA DESAI, J.)

(D.G. KARNIK, J.)